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No. 800

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 1210, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. A-1—A-15) is reported at 285 F. 2d 397. The decision of the National Labor Relations Board (Pet. App. C, pp. A-20—A-31; R. 1-11)[1] is reported at 127 NLRB No. 74.

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[1] "R." references are to the printed record in the court below.

JURISDICTION

The judgment of the court below was entered on December 22, 1960 (see Pet. App. A, p. A-1), and a decree was entered on January 19, 1961 (Pet. App. B, pp. A-16, A-18). The petition for a writ of certiorari was filed on March 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order issued by the Board as a remedy for a violation of the secondary boycott provisions of the National Labor Relations Act abridges lawful primary activity when it is phrased merely in the prohibitory language of the section of the Act found to be violated.

2. Whether, in the circumstances of this case, the Board properly found that certain of the union's statements to neutral contractors constituted threats, restraint or coercion outlawed by Section 8(b)(4)(ii)(B) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

STATEMENT

A. The Board's Findings of Fact

In the fall of 1959, the Gilmore Construction Company (Gilmore) was the general contractor on a con-

struction project at South High School in Omaha, Nebraska (R. 3; 16-17). There were several subcontractors on the project, one of which was the Simpson Company (Simpson), an accoustical and insulation contractor (R. 3; 16-17, 23). On November 20, 1959, when the construction was well under way, Simpson hired five day laborers through the Nebraska Unemployment Bureau to assist its truck driver in moving materials to the job site (R. 3; 19, 24, 31). Though all other workers on the construction project were union members, the Simpson laborers were non-union (R. 3; 22, 24, 27, 32).

During the afternoon of November 20, petitioner Union's business agent, Richard Otte, came to the job site and told Simpson's five laborers to stop work, which they did (R. 3; 19, 22, 23, 26, 28-29). Simpson's foreman on the job, upon learning of Otte's action, told the laborers to observe Otte's demand that they do no further work (R. 17-18, 19, 22). Simpson's foreman then had the five laborers paid off (R. 18, 20). Otte also told Joe Tripp, a laborer for Gilmore and a member of the Union, to stop work, which he did (R. 3; 27-28). Simpson's foreman then asked Otte "What do we have to do to keep from having a picket put on the job?" (R. 3; 21). Otte replied that Simpson would have to "sign a contract with the Union" and meet the Union's "wages and conditions" (R. 3; 21, 22-23).[2] That afternoon, the

[2] At no time material herein has the Union been the certified bargaining representative of Simpson's employees (R. 3).

Union commenced picketing the construction site with picket signs setting forth the Union's grievances against Simpson (R. 3-4; 13, 22, 23, 27-28).

The following morning, Saturday, November 21, Business Agent Otte telephoned M. G. Van Scoy, secretary of Gilmore, and informed him of the pickets at South High School. Otte said that he "wanted to tell * * * [Van Scoy] what * * * [Gilmore] could do to prevent pickets being on there Monday morning" (R. 32; see R. 4). Otte stated that the non-union laborers would have to be paid union scale for their work on November 20, and that Simpson would have to sign the Union's contract and hiring hall agreement (R. 4; 32). Van Scoy later talked to Morris Simpson, owner of Simpson, who in turn called Otte (R. 4; 24-25, 33). Morris Simpson agreed to pay the union scale for work done on the job, but refused to sign a contract (R. 4; 25, 33).

On Monday, November 23, Otte personally picketed at the construction site, and no employees of any employer went to work (R. 4; 21, 33). Van Scoy conferred with Otte at the job site, and advised Otte that arrangements had been made for Gilmore to do any laborers' work that Simpson required in the future, so that "there would be no more non-union laborers on the job" (R. 4; 25-26, 33). Van Scoy then asked Otte if he would stop picketing and was told, "no" (R. 33; see R. 4). Van Scoy asked, "What do we have to do?" (R. 33). Otte answered, "You will have to get the AGC contractors to black-

list Simpson and not allow him on any of your jobs." [3] Van Scoy then said, "You are kind of picking on us, putting us in the middle." Otte replied that he would picket if "any other contractor in Omaha had Simpson on his job." (R. 34.)

Later in the week, while picketing at the construction site continued, the Union's assistant business agent, Leonard Schaeffer, telephoned George Gilmore, president of Gilmore (R. 4; 28-29). During their conversation, George Gilmore asked what means could be used to get the picketing to stop. Schaeffer answered, "Well, you can run Simpson Company off the job" (R. 4-5; 29). Schaeffer also stated that Simpson would have to pay union wages and sign a contract with the Union before picketing would stop (R. 5; 29). Picketing at the construction site continued thereafter until it was enjoined by the District Court on December 4, 1959 (R. 5; 27-28).[4]

B. The Board's Conclusions and Order

The Board found that the Union's picketing at the construction project violated Section 8(b)(4)(i)(B) of the Act, in that it was not directed at Simpson, the primary employer, but rather at Gilmore and the other sub-contractors, being designed to force them to cease doing business with Simpson. In concluding that the picketing had this illegal secondary object,

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[3] Van Scoy is also president of the Associated General Contractors of Nebraska, and president of the Omaha Employers Association of AGC (R. 31).

[4] Simpson has a shop and warehouse in Omaha which were not picketed by the Union (R. 23-24).

the Board relied on Business Agent Otte's instruction to neutral employee Tripp, on the first day of the picketing, to stop work, and on the fact that the Union continued to picket at the project even after the Simpson employees were no longer on the premises and Otte had been assured by Van Scoy that they would not be used on the job again. (R. 6.)

Moreover, the Board found that, by Otte's statement to Van Scoy that the picketing would stop only if Gilmore removed Simpson from the job, and Assistant Business Agent Schaeffer's similar statement to the president of Gilmore, the Union had coerced and restrained the neutral employers at the job site, in violation of Section 8(b)(4)(ii)(B) of the Act (R. 6).

In relevant part, the Board's order (R. 8-11) required the Union to cease and desist from inducing or encouraging the employees of Gilmore or any other employer to engage in strikes or refusals to perform services, or from threatening or restraining Gilmore or any other employer, with an object of forcing those employers to cease doing business with Simpson, or with an object of forcing Simpson to recognize or bargain with the Union unless it has been certified under Section 9 of the Act. Affirmatively, the Board's order required the Union to post appropriate notices.

C. The Decision of the Court of Appeals

The court of appeals sustained the Board's unfair labor practice findings and enforced the Board's order with modifications not here relevant (Pet. App. A, pp. A-1—A-15).

ARGUMENT

1. Section 8(b)(4)(i)(B) of the Act proscribes secondary, but not primary, picketing. With respect to a site where both the primary and neutral employers are at work, picketing will be regarded as primary when it is confined so far as practicable to the primary employer, and as secondary when a purposeful effort is made to direct it at the neutral employers.[5] Petitioner does not contest (see Pet. 10, n. 5) the finding of the Board, affirmed by the court below, that its picketing at the school project was secondary, and thus for the objects proscribed by Section 8(b)(4)(i)(B). It merely contends (Pet. 9-10) that the order entered by the Board to remedy that violation is excessive in that it bans legitimate primary picketing as well. There is no merit to this contention.[6]

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[5] *National Labor Relations Board* v. *Local 294, Teamsters* (C.A. 2), 47 LRRM 2085, 2086-2087, November 10, 1960; *Alpert* v. *United Steelworkers*, 141 F. Supp. 447, 452 (D. Mass.).

[6] Contrary to petitioner (Pet. 9-10), there is no connection between the issue here and that in *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board and General Electric Co.*, No. 321, this Term. The issue in *Local 761* is whether the primary employer's own premises may be treated as a common situs when independent contractors are performing work there in a regular manner, so that the union is obliged to exercise the same restraint in picketing, insofar as the contractors and their employees are concerned, as it must in other situations where the primary employer and neutral employers are at work on the same site. In the instant case, on the other hand, there is no question that the common situs rules apply, and peti-

(*a*) The order is phrased in the prohibitory language of the particular provision of the statute which was violated. Following the precise form of Section 8(b)(4)(i)(B), it bars the Union from inducing the employees of Gilmore or any other employer to strike, for an object of forcing those employers to cease doing business with Simpson (the primary employer), or forcing Simpson to recognize the Union even though it has not been certified by the Board (R. 9). Hence, as the court below correctly observed (Pet. App. A, pp. A-13—A-14): "By explicit terms, the order is designed to prohibit only that conduct which is proscribed by the statute, that is, picketing or striking for an unlawful purpose. We cannot perceive of anyone suggesting that the order can rationally be construed to prohibit lawful primary picketing or lawful primary striking."[7]

Stated otherwise, the fact that the Union has been found to have engaged in secondary picketing once

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tioner, although asserting that the Board now finds a secondary object in a common situs situation on a different basis than it did earlier, has removed this question from the case by conceding (Pet. 10, n. 5) that there was enough evidence to sustain the Board's finding of a violation of Section 8(b)(4)(i)(B).

[7] In the face of this clear statement, there is no warrant for reading the earlier language in the opinion—"Inasmuch as the evidence here fully supports the finding that Union was engaged in secondary boycott activities, in violation of the Act, we need not determine the area of Union's rights, as against Simpson, the primary employer * * *" (Pet. App. A, p. A-12)—as manifesting an intention by the court to ban, in the future, even picketing directed solely at Simpson (see Pet. 14).

does not result, as petitioner assumes, in an order banning all future picketing. To be sure, petitioner must first remedy the violation found and comply with the order entered by the Board, and, to do so may require that it discontinue picketing for a reasonable period of time so as to dissipate the effects of the illegal activity.[8] However, at least at the end of this compliance period, petitioner would be free to resume picketing without violating the Board's order, provided that it conduct the picketing in such a manner that it could not be found to have secondary objects, as was the case with the original activity. In short, the language of the order, like the comparable language of Section 8(b)(4)(i)(B), must be read as applying only to the type of conduct which that section proscribes. See *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455, 460 (C.A. 2), certiorari denied, 350 U.S. 873; cf. *National Labor Relations Board* v. *Forest Lawn Memorial Park Association*, 198 F. 2d 71, 72 (C.A. 9); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C.A. 9), certiorari denied, 338 U.S. 827.

(*b*) Petitioner's suggestion (Pet. 9-14) that the Board's order in this case represents a departure from past practice is unfounded. Since 1947, when Section 8(b)(4) was added to the Act, the Board, upon finding unlawful secondary activity either in

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[8] Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 600; *Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. 2d 922, 927-928 (C.A. 2).

a common situs situation or in other cases, has entered an order in the prohibitory terms of that section, and these orders have been consistently enforced by the courts.[9] The Board has not been, and could not wisely be, more precise because the line

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[9] See, *e.g.*, *Denver Building and Construction Trades Council*, 82 NLRB 1195, 1198 (1949), enforced, 341 U.S. 675; *International Brotherhood of Electrical Workers*, 82 NLRB 1028, 1030 (1949), enforced, 181 F. 2d 34 (C.A. 2), affirmed, 341 U.S. 694; *International Brotherhood of Boilermakers (Richfield Oil Corp.)*, 95 NLRB 1191, 1194-1195 (1951); *Service Trade Chauffeurs, Local 145 (The Howland Dry Goods Co.)*, 85 NLRB 1037, 1041 (1949), 97 NLRB 125 (1951), enforced, 191 F. 2d 65, 199 F. 2d 709 (C.A. 2); *Local Union No. 55, Carpenters (Professional and Business Men's Life Insurance Co.)*, 108 NLRB 363, 376 (1954), enforced, 218 F. 2d 226 (C.A. 10); *General Drivers, Local No. 886 (American Iron and Machine Works Co.)*, 115 NLRB 800, 801-802 (1956), enforced, 357 U.S. 93.

General Teamsters, Local Union No. 249 (Crump, Inc.), 112 NLRB 311 (1955), relied on by petitioner (Pet. 11), is not to the contrary. There the Board found that the union violated Section 8(b)(4)(A), when, in the course of picketing Kaufmann, it directed that activity at Crump, an independent contractor who was doing construction work for Kaufmann on its premises. To remedy this violation, the Board entered an order in the same form as that here (112 NLRB at 313). However, the Board in its opinion stated that the order did not preclude the union "from peacefully picketing that portion of Kaufmann's premises where Crump is engaged in construction work so long as it makes clear that its dispute is with Kaufmann" (*id.* at 312). But, the reason for making explicit what would otherwise have been implicit in the Board's order was to emphasize the difference between the Board's holding and that of the trial examiner, who had outlawed all picketing at the place where Crump was working on the theory that it was not a situs which was shared with Kaufman but rather Crump's own "operating premises" (*id.* at 322-323).

between permissible primary activity and illegal secondary activity, particularly in a common situs situation, depends upon the inferences concerning the Union's objective which are drawn from a particular combination of circumstances, which fact cannot be anticipated or described in advance without an endless proliferation of details.

(*c*) Nor is a different conclusion required by the proviso added by the 1959 amendments, which states that nothing contained in Section 8(b)(4)(B) "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing", (see Pet. 11). This proviso was merely intended to set forth specifically the gloss which had previously been written upon Section 8(b)(4)(B) by administrative and judicial interpretation.[10] If an order entered under the original Section 8(b)(4) was not defective for failure to contain a reservation in favor of primary activity when that reservation was merely implicit in the statute (see n. 9, *supra*, p. 10), such omission does not make the order defective when the reservation is specifically written in the statute. Since the statute itself—formerly by implication and now explicitly—safeguards the right to engage in primary activity, it is clear that any order issued thereunder must be read in the light of that statutory limitation, and thus no substantive benefit is gained by repeating the limitation in the order itself.

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[10] See H. Rep. No. 1147, 86th Cong., 1st Sess., (1 Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) at 942).

(*d*) Finally, there is no conflict between the action of the court here and that of the Second Circuit in *McLeod* v. *Chefs, Cooks, etc., Local 89, H. & R. Emp. & B. Int. U.*, 280 F. 2d 760, 47 LRRM 2541, February 8, 1961 (Pet. 16). The latter case involved an appeal from a temporary injunction, issued under Section 10(l) of the Act, against picketing which there was reason to believe violated new Section 8(b)(7)(C). That section bans organizational or recognitional picketing carried on beyond a reasonable period of time (not to exceed 30 days) without a representation petition having been filed; however, this ban is subject to a proviso which permits "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing" is to stop deliveries. The picketing in *Chefs* was found to be within the proviso except that it had stopped deliveries in a few instances. Since the business being picketed was the Stork Club, which obtained deliveries only during certain hours, the court of appeals was of the view that, in those circumstances, it was possible to disentangle the legal picketing from the illegal picketing by merely banning picketing during the hours when deliveries were likely, and it accordingly ordered the injunctive decree drafted in those terms.[11] The situation here is

[11] It may be noted that Judge Learned Hand dissented. Chief Judge Lumbard concurred with doubts, and Judge Clark, who wrote the opinion for the court, acknowledged that perhaps the court had taken over "what partakes of

entirely different, for the Union's action at the school project, in directing its picketing at the neutral employers, colored all of the picketing there with an illegal secondary object. Moreover, as we have shown, the line between lawful primary picketing and illegal secondary picketing is not susceptible of delineation by the simple objective criterion, *i.e.*, effect on deliveries, which is provided in the case of Section 8(b)(7)(C).

2. Petitioner's challenge (Pet. 17-19) to the Board's finding, affirmed by the court below, that the statements of Union agents to Gilmore officials, that the picketing would continue unless Simpson were removed from the job (see the Statement, *supra*, pp. 4-5), constituted threats or coercion within the meaning of Section 8(b)(4)(ii)(B) raises only an evidentiary question which does not warrant review by this Court. See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491. Nor does predicating a finding of illegality on such statements result in holding the Union merely for threatening what it had a legal right to do (Pet. 18). Since the picketing in which the Union was engaged was illegal secondary, and not lawful primary, activity, the Board and the court below fairly interpreted the statements as threats to continue the same illegal picketing.

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being a legislative task" in the interest of making workable a statutory provision which would otherwise be "confusing and somewhat self-defeating" (47 LRRM at 2542).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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